

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: <u>7/19/11</u>
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KENNETH ARCHBOLD,

Petitioner,

08 Civ. 3898 (SHS)

-against-

ORDER

J. HESSEL, Acting Superintendent,

Respondent.
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SIDNEY H. STEIN, U.S. District Judge.

On June 20, 2011, Magistrate Judge Frank Maas issued a Report and Recommendation recommending that Kenneth Archbold's petition pursuant to 28 U.S.C. § 2254 be denied. Archbold submitted objections to that Report and Recommendation on July 1, 2011. The Court finds that these objections have no validity except as to Judge Maas's finding that Archbold's Fourth Amendment claim is procedurally defaulted. The basis for that finding was that, during the criminal action, Archbold had failed to challenge the legality of his arrest through a motion to suppress pursuant to CPL § 710.20. However, Archbold has submitted to the Court a "Notice of Omnibus Motion" in which he (1) argued to the trial court in the criminal action that the police lacked probable cause to arrest him, and (2) moved to suppress "all evidence obtain[ed] from [him] at the time of his arrest." (*See* Ex. #50 to Objections dated July 1, 2011.)

Nonetheless, the Court affirms the Report and Recommendation. Archbold's Fourth Amendment claim is unexhausted because, as he concedes, he did not raise this ground when he sought leave to appeal to the New York Court of Appeals. (*See* Habeas Petition at 11(d).) Moreover, this claim has no merit. Nowhere in the omnibus motion,

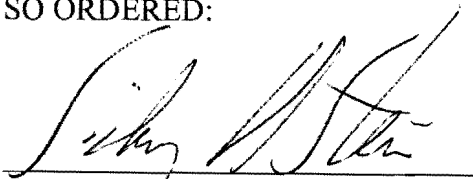
in his petition for habeas relief, or in his objections does Archbold specify any evidence whatsoever that was obtained from him as a result of his alleged unlawful arrest, let alone any such evidence that was introduced or even sought to be introduced at trial.

Accordingly, IT IS HEREBY ORDERED that:

1. Magistrate Judge Maas' Report and Recommendation is adopted with the additional conclusions noted above;
2. The petition pursuant to 28 U.S.C. § 2254 is dismissed;
3. As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253(c); *see also Richardson v. Greene*, 497 F.3d 212, 217 (2d Cir. 2007); and
4. Pursuant to 28 U.S.C. § 1915(a), the Court certifies that any appeal from this Order would not be taken in good faith.

Dated: New York, New York
July 19, 2011

SO ORDERED:



Sidney H. Stein, U.S.D.J.